Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

LAWRENCE RAY CARMICHAEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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13 pp

QUESTIONS PRESENTED

I. Whether the Court's *ex parte* conferences with the government at trial and the government's failure to disclose *Brady/Giglio* material for an *in camera* inspection violates the Petitioner's Sixth Amendment right to counsel.

II. Whether the Sixth Circuit applied an improper standard of review to affirm Petitioner's conviction contrary to *McCormick v. United States*, 500 U.S. 257 (1991).

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. A) is reported at *United States v. Lawrence Ray Carmichael*, 232 F.3d 510 (6th Cir. 2000). The judgment of the United States District Court for the Eastern District of Kentucky, dated January 22, 1999, is set forth as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on October 20, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing *en banc* on December 12, 2000 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

This case involves the Sixth Amendment to the United States Constitution; the provisions of Title 18 U.S.C. § 1951 and Fed. R. Crim. P. 52(b).

The Sixth Amendment states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

Title 18 U.S.C. § 1951(a) states in pertinent part:

> Whoever in anyway or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this Title or imprisoned not more than twenty years, or both.

Fed. R. Crim. P. 52(b) states:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

STATEMENT OF THE CASE

On August 12, 1998, Petitioner was indicted on two counts for alleged violations of the Hobbs Act, 18 U.S.C. § 1951. The Petitioner filed a request for discovery on August 21, 1998, asking for *inter alai*, exculpatory and impeachment evidence.

The matter was brought for trial on October 5, 1998. Prior to the commencement of trial, the Petitioner orally renewed his motion for any exculpatory or impeachment evidence as related to the Government's chief witness, Rodney Adams. As a result of that motion, the government conducted an *ex parte* conference with the trial court relating to the requested material regarding Adams.[1]

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1. Although the conference was advertised as an *in camera* review, Petitioner subsequently learned, upon receiving the sealed trial transcripts for appeal, that no materials were actually reviewed by the court during this conference.

The trial continued on October 6, 1998. The Petitioner filed a written motion to compel production of impeachment material requested regarding Adams. A second *ex parte* conference was conducted between the government and the trial court. Again no materials were supplied by the government nor reviewed by the Court. Based upon the *ex parte* conferences, the motion to compel disclosure was overruled.

The trial continued on October 7, 1998 with the government concluding its proof. At the close of the government's case-in-chief, the Petitioner moved the Court for judgement of acquittal on both counts of the indictment. Petitioner argued that the government failed to sustain its burden of proof under the elements of the offense and the precedents of the United States Supreme Court. The trial court granted the Petitioner's motion as to Count One, but denied the same as to Count Two.

The trial continued on October 8, 1998 at which time the Petitioner concluded its presentation of proof. Petitioner renewed his motion for judgment of acquittal. The trial court again denied the motion. The trial concluded on October 9, 1998 when the jury returned a guilty verdict on Count II. Thereafter, on October 20, 1998, the Petitioner filed a motion for judgment notwithstanding the verdict arguing the government failed to meet its burden of proof to sustain Petitioner's Hobbs Act conviction. The trial court denied the motion. On January 22, 1999 Petitioner received a sentence of 27 months imprisonment.

On January 28, 1999 Petitioner timely filed a notice of appeal to the Sixth Circuit. On July 7, 1999 Petitioner filed a motion to supplement the record regarding newly discovered exculpatory material in the possession of the

government which was not disclosed at the time of trial. Petitioner sought for the appellate court to review, *in camera*, a wiretap affidavit filed by the government in June 1998, shortly before Petitioner's trial, which detailed extensive criminal activity of its chief witness, Rodney Adams. The affidavit contained information about Adams' criminal activity which was contemporaneous to the allegations made in Petitioner's indictment. The trial court denied the motion to supplement on July 21, 1999. Thereafter, the Sixth Circuit denied a similar request in August 1999 to review the document *in camera* or supplement the record.

In June 2000 the Petitioner filed with the Sixth Circuit an affidavit in support of a criminal complaint which detailed Adams' criminal activities dating back to 1997. This information had not been disclosed to the Petitioner nor to the court as required by *Brady/Giglio*. On October 20, 2000 the Sixth Circuit in a two to one plurality affirmed the Petitioner's conviction in a published opinion. Rehearing *en banc* was denied on December 12, 2000. Petitioner now timely seeks this Writ of Certiorari.

STATEMENT OF THE FACTS

Petitioner served as the Commonwealth's Attorney for the 28th Judicial Circuit in Kentucky. In such capacity the Petitioner had the responsibility to prosecute and on occasion investigate felony offenses.

In December 1997, Petitioner received a cash contribution from Mark Knight, an attorney in Pulaski County, to purchase Christmas decorations for Petitioner's office. Unbeknownst to Petitioner, the money had come from Knight's client, Rodney Adams. Although Petitioner was not

involved in any formal prosecution of Adams, charges were pending against Adams and were subsequently dismissed by another prosecuting entity not connected to Petitioner's office. The money was used to purchase Christmas decorations and displays in December 1997.

Thereafter, in March 1998, Petitioner received information that Rodney Adams was interested in contributing money to local political campaigns. Petitioner sought confirmation of Adams' interest through Adams' attorney, Mark Knight, on March 19, 1998. Petitioner had met Adams for the first time in January 1998 when Adams agreed to attempt to gather information for an unrelated criminal investigation of one of his associates, Jerry McKinney. Following Petitioner's meeting with Knight, Adams met with Petitioner at Petitioner's office to discuss Adams' interest in contributing money to various local campaigns then in progress in Pulaski County, Kentucky. During the meeting on March 23, 1998, Adams acknowledged an interest in contributing $50,000 to local campaigns. At one point Adams even acknowledged an interest in contributing money in the future to Petitioner's re-election campaign.

Adams agreed to deliver the money to Knight's office where Petitioner would arrange to pick it up. During this discussion Petitioner did not agree nor promise to perform any favors or services for Adams in exchange for the contributions other than to inform the successful candidates of the source of these funds. Unbeknownst to the Petitioner, Adams was secretly recording the conversation for the Kentucky States Police (KSP).

The Kentucky States Police detective, upon receiving the taped conversation, telephoned Knight. Knight states that Adams must have taken Petitioner's campaign solicitation the wrong way, because Petitioner never intended to imply a *quid pro quo* for the campaign contributions.

Petitioner met with Adams again the following day to discuss delivery of the campaign contributions. Adams claimed, but the Petitioner denied, that he gave Petitioner $5,000 at this meeting. The money was never recovered and the KSP confirmed that Adams was not searched upon his return from this meeting with Petitioner. During this conversation with Petitioner, Adams suggested that some of his associates were interested in contributing to Petitioner's campaign fund. Again, no promises were made during this meeting, and the conversations focused on campaign contributions with an "understanding" of the money's use for that purpose.

Two days thereafter, on March 26, 1998, Adams telephoned Petitioner to arrange a meeting with Petitioner. The KSP had planned to videotape the meeting, but the meeting was aborted when Petitioner discovered the surveillance van and requested assistance from the Somerset Police Department to investigate. Petitioner subsequently learned that the occupant of the van was a KSP officer. A short time later, Petitioner provided the KSP with an interview which was surreptitiously recorded.

Petitioner was subsequently indicted and tried on two counts of violations of the Hobbs Act. The government charged Petitioner regarding receipt of the donation for the Christmas decorations and for the campaign solicitation to Adams. Prior to and during the trial, Petitioner sought discovery of impeachment and exculpatory information as

it related to Rodney Adams. Petitioner received no such information prior to trial. However, at trial, the trial court conducted an *ex parte* conference with the government to discuss Petitioner's discovery request concerning Adams. At the initial *ex parte* conference, the government acknowledged that a Title III wiretap authorization of Adams phone was on file in the United States District Court at London, KY. The government confirmed that Adams' name had surfaced during the preliminary drug investigation, but informed the court that no exculpatory information existed from that Title III authorization. The government did not reveal the existence of the supporting affidavit attached to the wiretap application which, in fact, described specific instances of Adams' criminal activities dating back to 1997.

When the Petitioner persisted with a good faith belief that impeachment evidence did exist, the government again confirmed that lack of exculpatory information during a second *ex parte* conference the following day of trial.[2]

Based upon the government's representations, the Court denied Petitioner's discovery request. No *in camera* inspection of any documents has ever occurred although Petitioner was led to believe that was the purpose of the conference between the government and the court. At trial, Petitioner did not utilize any information of Adams drug related activities during his cross examination as no specific information had been provided by the government.

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2. Adams was subsequently arrested in May 2000 for drug related offenses dating back to 1997. At the time of his arrest he was transporting nearly 2000 kilograms of marijuana. Petitioner advised the Sixth Circuit panel of this information in June 2000 and submitted an FBI's complaint affidavit, which specified Adams' illegal drug activities.

The trial court granted a directed verdict of acquittal as to the money received by the Petitioner for the Christmas decorations, but Petitioner was subsequently convicted of one count of the Hobbs Act relating to the campaign solicitation. Following his sentencing, the filing of his notice of appeal and upon receiving the sealed transcript in March 1999, Petitioner learned of the substance of the *ex parte* conferences. On appeal Petitioner immediately sought to supplement the record with the June 1998 affidavit filed in support of the Title III wiretap application, which should have been supplied to the trial court for an *in camera* review. Both the trial court and the Sixth Circuit denied Petitioner's request to permit the filing of this document. Despite claims by the Petitioner's counsel that this document contained vital impeachment information, no independent review has been conducted by either court and the information has not been provided for any *in camera* inspection by any court.

On appeal, the Sixth Circuit rejected Petitioner's claims of constitutional error of the *ex parte* conferences and the *Brady/Gigilo* violations by concluding Petitioner's counsel had not properly preserved the issue for appellate review. The Sixth Circuit also rejected Petitioner's argument that the trial court abused its of discretion in failing to review the document *in camera*. The appellate court further concluded that the *ex parte* conferences did not constitute plain error and thus did not violate the Petitioner's Sixth Amendment rights. The Sixth Circuit concluded that the trial court was within its discretion to accept the representations of the government and the Petitioner's claims of deception regarding the misrepresentations were merely speculation.

Likewise on appeal, the Sixth Circuit concluded that the standard of review was whether the jury could draw any

adverse inferences from Petitioner's conversations with Adams to infer Petitioner's attempt to extort money from Adams in exchange for protecting Adams' illegal gambling operation. Petitioner argued that under both *Evans v. United States*, 504 U.S. 225 (1992) and *McCormick v. United States*, 500 U.S. 257 (1991) that the court had to find specific or expressed promises being offered by the Petitioner in exchange for the campaign contributions to sustained Petitioner's conviction under the Hobbs Act. The Sixth Circuit concluded that no specific or expressed promises were necessary to sustain Petitioner's Hobbs Act conviction.

From this adverse decision Petitioner now seeks a writ of certiorari before this Honorable Court.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SIXTH CIRCUIT CONFLICTS WITH THE PETITIONER'S RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT AND CONFLICTS WITH PRIOR DECISIONS OF THE SIXTH AND SECOND CIRCUITS.

The decision of the Sixth Circuit conflicts with the previous opinion of that Court in *United States v. Minsky*, 963 F.2d 870 (6th Cir. 1992) and in the Second Circuit of *United States v. Leung*, 40 F.3d 577 (2d Cir. 1994). Both these cases condemn *ex parte* conferences as a violation of the accused Sixth Amendment Right to counsel. Yet, the Sixth Circuit rejects these precedents to uphold *ex parte* communications between the government and the trial court during Petitioner's trial.

The primary issue involves the intertwined issues concerning the failure of the trial court to conduct an *in camera* inspection of material in the government's possession that contained exculpatory evidence or impeachment evidence, and the propriety of *ex parte* conferences during the course of the trial between the government and the court relating to the disclosure of this material.

The Petitioner's right to counsel is essential at every crucial step in the adversarial process. *United States v. Cronic*, 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183, 21 L. Ed. 2d 325, 89 S. Ct. 347 (1968). Furthermore, Petitioner has a constitutional right to impeachment evidence in the government's possession. In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Such favorable evidence also includes impeachment evidence of a key government witness. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). The *Bagley* Court held that impeachment evidence is "evidence favorable to an accused," as identified in *Brady*, such that, if disclosed and used effectively, it may make the difference between conviction and acquittal. A given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. *Id.* 473 at 676. "A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

The government has failed in its obligation to disclose vital impeachment information regarding its key witness, Rodney Adams. Specifically the government had information of Adams extensive criminal activity beginning in 1997 and continuing up to and including the time of trial, which would have severely diminished his credibility. Adams' testimony and credibility was the hub which held the government's case together against the Petitioner. Not only did the government fail to disclose the information to the Petitioner, it misrepresented to the court that no such information existed. The Sixth Circuit erroneously concluded that the trial court was within its discretion to accept the government's representation despite claims by defense counsel that those representations were false. The Sixth Circuit ignores information provided by Petitioner which reflects "some indication of misconduct" as required by *United States v. Hernandez*, 31 F.3d 354, 361 (6th Cir. 1994), to defeat thee government's presumption of truthfulness.

In support of his claims of prosecutorial misrepresentations, Petitioner first alleged that the June 1998 wiretap application's supporting affidavit, on file under seal in the United States District Court at London, Kentucky, contain specific instances of criminal wrongdoing which he would have used to impeach Adams' credibility at trial. The Sixth Circuit refused to examine the document, *in camera*, as requested by Petitioner. Nor did it remand the case to the trial court for an *in camera* inspection.

Second, the Petitioner provided the Sixth Circuit with a second affidavit filed when a criminal arrest warrant was issued for Adams in May 2000. This affidavit also specified criminal activity by Rodney Adams, dating back

to 1997 which continued until the time of his arrest. This contemporaneous criminal activity provided valuable impeachment information which, when used effectively by the Petitioner, would have diminished Adams' credibility before the jury and thus affected the outcome of the trial. *See Bagley, supra*, 473 U.S. at 681. The Sixth Circuit dismisses these claims of prosecutorial misconduct as "speculative" in nature. *Carmichael, supra*, at 519.

As recognized by the dissent, the government failed to establish its heavy burden of justifying its *ex parte* conferences with the court especially in light of the additional information provided by the Petitioner. Furthermore, it is important to note that the *ex parte* conferences were advertised to the Petitioner as an *in camera* inspection. Petitioner did not object to an *in camera* inspection as advertised, but neither did he acquiesce to an *ex parte* conference. Only upon receipt of the sealed trial transcripts in preparation of his appeal did Petitioner learn that no *in camera* inspection had occurred. Consequently, it was the Petitioner, rather than the trial court, which was "lulled" into a mistaken belief of what actually occurred between the government and the court out of earshot of the Petitioner. *Id.* at 518. As noted by the dissent, after articulating the court's profound distaste for *ex parte* communications and acknowledging the court's jurisdiction to consider petitioner's Sixth Amendment claim, the majority then engages in cursory analysis before summarily rejecting Petitioner's claims. Clearly, the Sixth Circuit's analysis of the facts of Petitioner's case with the existing legal precedents reaches inconsistent conclusions. Petitioner's substantial rights were affected by the *ex parte* conferences aggravated further by the deception employed by the government during those conferences.

The Sixth Circuit concluded that Petitioner's counsel failed to properly preserve this issue for appellate review and chose not to apply any heightened scrutiny to the error. "[C]ourts indulge every reasonable presumption against waiver of fundamental rights [and] we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of an known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

The dissent in *Carmichael*, *supra*, recognized that the error was properly preserved, but even if not preserved by Petitioner's counsel, the error should be recognized by the Court pursuant to Fed. R. Crim. P. 52(b), as plain error. *See United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). Herein, the *ex parte* communications were a deviation from a well established legal rule which Petitioner did not waive. *Olano,* 507 U.S. at 732-33. Because the *ex parte* conferences are generally disallowed under the law of the Sixth Circuit the error is "plain". *Olano,* 507 U.S. 734; *Minsky*, 963 F.2d at 874. Finally, the error affected Petitioner's substantial rights, because the error affected the outcome of the trial in a number of ways, but primarily because *ex parte* presumes prejudicial impact. As eloquently stated by dissent:

> By allowing *ex parte* conferences before and during trial, the district court demonstrated a willingness to share intimate discourse with the government while excluding Defendant. Once an affinity between the district court and the government has been established, the district court's ability to serve as a neutral arbiter is suspect. This affinity perverts the adversarial process and creates an intolerable air of partiality.

> The Supreme Court found that a trial conducted before "a judge who [i]s not impartial" to be a "structural defect affecting the framework within which the trial proceeds." *Id.* at 309-10, 111 S. Ct. 1246. In light of the foregoing, the majority's conclusion that the *ex parte* communication did not affect Carmichael's substantial rights offends traditional notions of fairness and opens the door for prosecutorial abuse.

United States v. Carmichael, 282 F.2d 510, 526 (6th Cir. 2000).

Allowing the government unfettered access to the court's ear undermines the adversarial process and taints the appearance of judicial impartiality. In failing to recognize this constitutional infringement the Sixth Circuit erroneously denied Petitioner his constitutional right to counsel at a critical stage in the trial proceeding.

Accordingly, this Court should grant Petitioner's Writ of Certiorari on this Sixth Amendment issue and *Brady/Giglio* violations.

II.

THE SIXTH CIRCUIT APPLIED AN IMPROPER STANDARD OF REVIEW TO AFFIRM PETITIONER'S CONVICTION CONTRARY TO THE HOLDING OF *MCCORMICK v. UNITED STATES*, 500 U.S. 275 (1991).

In affirming Petitioner's conviction, the Sixth Circuit relied upon inferences from conversations conducted between the Petitioner and the government witness, Rodney Adams, to determine that Petitioner attempted to extort Adams to make campaign contributions to Petitioner.

Evans v. United States, 504 U.S. 255, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992). Specifically, the *Carmichael* Court stated:

> A jury could reasonable have found that "understanding" Carmichael had with Adams was that Adams would make substantial cash payments to Carmichael in exchange for Carmichael continuing to let Adams conduct his illegal gambling operations without the risk of being prosecuted by Carmichael.

Id. at 519.

Additionally, the Sixth Circuit concluded:

> The jury, however, could reasonably have found that the intended implication of Carmichael's request for a very large cash contribution was that if Adams did not pay, Carmichael would cause Adams to be arrested and prosecuted, or would assist federal authorities in prosecuting Adams.

Id. at 520.

Other than these far reaching inferences, taken out of context of the actual conversations, the *Carmichael* Court does not cite a single specific promise or expressed agreement communicated by Petitioner to Adams which sustains Petitioner's Hobbs Act conviction. The absence of this expressed *quid pro quo* is sufficient to reverse Petitioner's conviction in this instance.

In its analysis of the Petitioner's facts, the Sixth Circuit found that the conversations between Adams and Petitioner focused on solicitation of campaign contributions from

Adams for the purpose of creating a campaign slush fund and possibly for Petitioner's own future campaign. *See United States v. Carmichael*, 232 F.3d 510, 514, 515 (6th Cir. 2000). Having accurately recognized the intent and purpose of the solicitation, the Sixth Circuit then summarily rejects Petitioner's argument that the lack of a specific agreement or expressed promise constitutes reversing Petitioner's conviction. The Sixth Circuit opinion is contrary to the Supreme Court decision which held that a Hobbs Act conviction for public officials engaged in campaign solicitations must clearly established that the accused made an expressed or explicit promise in exchange for the money being solicited. *McCormick v. United States*, 500 U.S. 257, 266, 111 S. Ct. 1807, 114 L. Ed. 2d 303 (1991); *Evans, supra*, 504 at 268. There must be a *quid pro quo*. *McCormick, supra*, 500 at 574.

As in *McCormick*, Petitioner herein challenges the judgment below affirming his conviction due to the Court of Appeals' rejection of his claim that since the requests for money were campaign contributions the solicitation did not violate the Hobbs Act because he did not make any promises to perform or not to perform anything within his official duties as Commonwealth's Attorney in exchange for the money. The *Evans* Court, a year later, likewise, adopted the standard announced in *McCormick* regarding campaign solicitation cases. *Evans, supra*, 504 at 268. However, in *Evans* the solicitation involved seeking money by the County Commissioner from a party interested in obtaining approval for rezoning a tract of land. Thus, the issue arose whether the money was a campaign solicitation or a payment of services in the Board Member's official capacity which he was not authorized to receive. In Petitioner's situation, there was no dispute that the money he solicited from Adams was for the purpose of political campaigns. While the Supreme

Court sanctioned the use of inferences to drawn conclusions or to determine the intent of the parties in non-campaign cases, it re-affirmed its holding in *McCormick* to require specific or expressed promises when those discussions involve campaign contributions. *Id.*

In the present situation, the Sixth Circuit never identified any expressed promise to perform or not to perform any official duty by the Petitioner for Adams or anyone else in exchange for the campaign donations. The Sixth Circuit erroneously affirmed Petitioner's conviction by failing to apply the proper standard of review.

Consequently, this matter must be remanded to the Sixth Circuit to identify evidence which satisfies the standard of review announced in *McCormick* for the Petitioner's conviction to be affirmed. Accordingly this court should grant a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED OCTOBER 20, 2000

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99-5179

United States of America,

Plaintiff-Appellee,

v.

Lawrence Ray Carmichael,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
No. 98-00076 — Karl S. Forester, District Judge.

Argued: June 20, 2000
Decided and Filed: October 20, 2000

Before: KEITH, DAUGHTREY, and GILMAN,
Circuit Judges.

* * *

GILMAN, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. KEITH, J., delivered a separate dissenting opinion.

Appendix A

OPINION

RONALD LEE GILMAN, Circuit Judge. Lawrence Ray Carmichael, formerly a Commonwealth attorney for three counties in eastern Kentucky, was convicted of extorting money from a local bookmaker in violation of the Hobbs Act, 18 U.S.C. § 1951. He was sentenced to twenty-seven months of incarceration and two years of supervised release. For the reasons set forth below, we **AFFIRM** Carmichael's conviction.

I. BACKGROUND

In late November or early December of 1997, a man named Rodney Adams was charged with wanton endangerment or assault (the record is not clear on this point) in Kentucky state court in one of the counties within Carmichael's jurisdiction. Adams owned a pawn shop and commercial rental property in Somerset, Kentucky. He also ran a thriving (and illegal) bookmaking operation and poker game out of his pawn shop. Adams's bookmaking operation, in which he handled bets for players from Kentucky, Tennessee, and Alabama, grossed up to $400,000 per week, and resulted in net profits of up to $150,000 per week. He also had a criminal record consisting of a 1979 conviction for robbery and a 1989 conviction for cocaine possession.

Adams, worried about being indicted as a result of the 1997 criminal charge, directed his attorney, Mark Knight, to telephone Carmichael. As a Commonwealth attorney, Carmichael was responsible for prosecuting individuals who are charged with felonies. Carmichael told Knight that the

county attorney could handle the matter. Because county attorneys in Kentucky prosecute persons accused of misdemeanors, but not felonies, the obvious implication of this statement was that Carmichael was not interested in prosecuting the offense as a felony. Carmichael, however, could have charged Adams with a felony for the offense in question.

During the conversation, Carmichael asked Knight if Adams would be willing to donate several hundred dollars to pay for Christmas decorations in Carmichael's office. (Carmichael was not allowed to use state funds for the decorations.) Knight relayed the request to Adams, who agreed to pay on the basis that Carmichael was the highest-ranking law enforcement officer in the county and that it would be foolish to "make him mad for $500." Carmichael knew about Adams's illegal gambling business and Adams knew that Carmichael had the power to shut it down and have Adams arrested. Under the circumstances, Adams thought it would have been "very stupid" not to pay Carmichael.

Knight asked Carmichael for purchase receipts and Carmichael obliged, giving Knight receipts acknowledging the payment for Christmas decorations of more than $500. Adams reimbursed Carmichael, although the amount was more than he had expected. The county attorney's office subsequently agreed to dismiss the pending charges against Adams after the passage of sixty days. At the end of the sixty days, the charges were dismissed with prejudice.

Appendix A

In January of 1998, Carmichael asked Adams to assist him in the investigation of an individual named Jerry McKinney. The precise nature of this investigation cannot readily be ascertained from the record, although it apparently related to homemade sex videos that involved prominent individuals. Adams agreed, and Carmichael arranged for Adams to meet with Kentucky State Police Detective David Mirus.

At the first meeting between Adams and Det. Mirus, Carmichael introduced Adams as "a bookie," although Carmichael said he was not interested in prosecuting Adams. Carmichael promised Adams that his name would not be used in the investigation. At this point, Carmichael had already acquired one of McKinney's sex videos, and Adams promised Carmichael that he would be able to obtain a second. After he had discussed the investigation of McKinney with Adams, Det. Mirus learned that Adams's name had come up in an ongoing drug investigation, although it was later determined that the allegations regarding Adams's involvement were "unfounded."

On March 19, 1998, Carmichael told Knight that he had "received word" that Adams was interested in making a very large campaign donation. Carmichael also told Knight that Adams's name had come up in the course of a federal investigation and that he knew that Adams had "been wiring large sums of money, cash from a truck stop in the Somerset area." During the conversation, Carmichael added that he had "lived up to his end of the deal on the McKinney matter, that Rodney's name had been kept secret, had not been used, [and] had not been made public." Finally, Carmichael said

that Adams "had stepped on some of the toes of the Feds in [the] McKinney investigation." Carmichael suggested that Knight ask his client for $100,000 in cash, which would go into a slush fund of Carmichael's creation to be spent on political campaigns of Carmichael's choice. The request, Carmichael told Knight, was based on the reasoning that if Knight asked for $100,000, Adams might be inclined to give $50,000.

On March 21, 1998, Knight reported to Adams that Carmichael had requested $100,000 from him "to distribute for campaign funds," but hoped to get $40,000 or $50,000. Knight repeated to Adams what Carmichael had said about Adams's name "coming up" in the course of an ongoing federal investigation. Adams "freaked out" at this news, and reported Carmichael's request to County Attorney Fred Niekirk and Det. Mirus in the belief that Carmichael was making an oblique threat that Adams would be prosecuted if he did not give Carmichael $40,000 or $50,000. Two days later, Carmichael summoned Adams to his office, explaining that he preferred not to talk on the telephone. As requested, Adams went to Carmichael's office, meeting with him in a conference room.

Carmichael said that he appreciated Adams's help and had kept Adams's name out of the McKinney investigation. He also told Adams that he had "an idea" that could help Adams, but wanted to be "very careful." According to Adams, the idea consisted of Adams delivering a manila envelope containing $50,000 in cash to Knight's office, where it would be picked up by Knight's secretary. The money was to be used to help several local officials, including

the county sheriff and eventually Carmichael himself, secure re-election. Carmichael and Adams agreed to meet the next day. Adams then left Carmichael's office through the back door, as Carmichael had instructed.

The next day, Adams telephoned Carmichael and arranged to meet him at a Burger King restaurant. Adams had in hand $5,000 in bait money that had been provided by Det. Mirus. At the Burger King, Adams offered Carmichael the $5,000 and promised him that more money would be forthcoming. Carmichael opened his briefcase and Adams put the money inside. Adams suggested that some of his gambling associates were willing to contribute to Carmichael's slush fund because they "were not hurting nobody" and preferred that local law enforcement authorities let them gamble in peace. Carmichael replied, "I think we have an understanding."

Two days later, Carmichael called Adams to arrange a meeting at which Adams would make the next payment. The police planned to videotape this meeting, but the meeting was aborted because Carmichael discovered that the police were watching him. About an hour after Carmichael detected the surveillance, Kentucky State Police Lieutenant Jerry Provence and Captain Larry Lewis interviewed Carmichael.

Carmichael insisted that he was trying to set Adams up, instead of the other way around. He claimed that a police officer had approached him and told him that Adams was interested in buying influence among local political officials, and was prepared to contribute substantial sums of money to various campaigns in order to carry out his plan.

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(The police officer that Carmichael identified as having told him this later denied having any such conversation with either Adams or Carmichael.)

Carmichael initially asserted that he told David Guffy, a detective under his command, that Adams was under investigation, and that he had dispatched Det. Guffy to Knight's office to pick up Adams's attempted payoff and then to take it home. At that point, Carmichael said, he and Det. Guffy would "figure out what to do with it next." Carmichael, however, subsequently admitted that he had only told Det. Guffy to pick up a package, and that he never told him that the package was supposed to contain bribe money that was evidence in an ongoing official-corruption investigation. In fact, no law enforcement officer (other than Carmichael and possibly Det. Guffy) knew anything about Carmichael's supposed investigation of Adams.

Carmichael was indicted and charged with two counts of extortion in violation of the Hobbs Act. Count I of the indictment pertained to the alleged extortion of $500 for Christmas decorations at Carmichael's office. Count II pertained to the alleged extortion of slush fund contributions. At the close of the government's case, Carmichael moved for a judgment of acquittal. The district court granted the motion as to Count I of the indictment, but denied the motion as to Count II. Carmichael was subsequently convicted on Count II by the jury, and then sentenced by the court to twenty-seven months of incarceration, to be followed by two years of supervised release.

On appeal, Carmichael argues that (1) his alleged conduct lacked the requisite connection with interstate commerce to support a Hobbs Act conviction, (2) the prosecution may have withheld evidence that might have been used to impeach Adams, the government's star witness, (3) the evidence was insufficient to convict, (4) the district court improperly excluded the testimony of a prospective defense witness, and (5) the district court improperly instructed the jury.

II. ANALYSIS

A. Connection with interstate commerce

The United States does not have the power under the Commerce Clause to outlaw purely intrastate crime. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 567 (1995) (refusing to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"). Consequently, alleged criminal conduct must have some connection to interstate commerce in order to state an offense under the Hobbs Act.

The Hobbs Act's jurisdictional provision, however, is extremely broad. *See* 18 U.S.C. § 1951(b)(3) (providing that "commerce" for the purposes of the Hobbs Act includes "all . . . commerce over which the United States has jurisdiction"); *Stirone v. United States*, 361 U.S. 212, 215 (1960) ("[The Hobbs Act] speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws

such interference 'in any way or degree.' ") (citation omitted). As a result, even a very minimal connection to interstate commerce is sufficient to sustain a Hobbs Act charge. *See, e.g., United States v. Mills*, 204 F.3d 669, 671 (6th Cir. 2000) ("The maxim 'de minimis non curat lex' does not apply in determining whether an effect on commerce is sufficient to satisfy the jurisdictional predicate of the Hobbs Act. It has long been the understanding in this circuit that even a 'de minimis' effect on interstate commerce will suffice."); *see also United States v. Atcheson*, 94 F.3d 1237, 1243 (9th Cir. 1996) ("To establish a de minimis effect on interstate commerce, the Government need not show that a defendant's acts actually affected interstate commerce. Rather, the jurisdictional element is satisfied by proof of a probable or potential impact.") (citation and internal quotation marks omitted).

This court recently concluded that a law enforcement officer's extortion of payments of $3,500 each in exchange for a job as a sheriff's deputy had the requisite connection to interstate commerce because there was a "realistic probability" that the prospective sheriffs' deputies, who were young and lacked significant financial assets, would turn to an interstate lender recommended by the defendant in order to come up with the money for the payments. *See Mills*, 204 F.3d at 672. *But cf. United States v. Min Nan Wang*, 222 F.3d 234 (6th Cir. 2000) (concluding that a residential robbery did not satisfy the jurisdictional element of the Hobbs Act).

Based on the evidence presented at Carmichael's trial, a reasonable jury could have concluded that Carmichael attempted to extort money from Adams in exchange for not

cracking down on Adams's illegal poker and bookmaking operations, and that there was a realistic probability that some of the money would come from the proceeds of interstate gambling. We thus conclude that the government met its burden of showing the required connection to interstate commerce.

B. *Brady* material/in camera review

Carmichael argues that the district court abused its discretion by not reviewing in camera transcripts of Adams's wiretapped telephone conversations. Those conversations were obtained as part of a wiretapping operation pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 at a time when the United States Attorney's Office suspected that Adams might be engaged in drug dealing. At trial, and now on appeal, the government asserts that the investigation failed to uncover any evidence that could have been used to impeach Adams, and that revealing the existence of this wiretap (which was still ongoing at the time of Carmichael's trial) would have "blown" the investigation.

The government has long been under an obligation to disclose both exculpatory evidence and evidence that might tend to impeach the credibility of a key government witness. *See Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963). This court, however, has held that because prosecutors are officers of the court, district courts may take them at their word when they inform the court that they have reviewed specified sealed documents and that those documents do not contain material subject to compulsory disclosure under *Brady*. *See United States v.*

Hernandez, 31 F.3d 354, 361 (6th Cir. 1994) (holding that, in the absence of "some indication of misconduct" by the government, the district court is not required to conduct an in camera review to verify the government's assertion).

Although we do not believe that it would be a satisfactory solution to force district judges to scrutinize large volumes of sealed materials whenever defense counsel request that they do so, we nevertheless have serious misgivings about the breadth of the rule announced in *Hernandez*. After all, it is difficult to conscientiously conclude that the government has met its obligations under *Brady* without seeing the materials that the government concededly did not disclose. Nevertheless, *Hernandez* is a published opinion and is the law of this circuit. *See Salmi v. Secretary of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (noting that a panel of this court "cannot overrule the decision of another panel" and that "[t]he prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision"). *Cf. United States v. Leung*, 40 F.3d 577, 582 (2d Cir. 1994) ("[I]n some circumstances the trial court should not rely on the Government's representations as to the materiality of potential impeachment evidence, but should instead undertake an independent in camera review of relevant Government files to determine materiality."). Counsel for the government has represented unambiguously that all material that was then in its possession that might have been used to impeach Adams was disclosed.

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During Carmichael's trial, counsel for the government twice asked, and received, permission from the court to approach the bench alone, in order to explain to the judge — out of the earshot of Carmichael and his attorney — what was on the wiretap recordings, and why none of it implicated Adams in drug dealing or other illegal activities. Despite the highly unusual nature of this request by counsel for the government, Carmichael's attorney did not object. Carmichael now argues that his Sixth Amendment rights were violated by these two ex parte discussions, and that this alleged violation, along with the district court's refusal to review the sealed transcripts that Carmichael suspected might contain *Brady* material, constitutes reversible error.

As a general rule of thumb, in all but the most exceptional circumstances, ex parte communications with the court are an extraordinarily bad idea. This court has not concealed its strong disapproval of ex parte approaches in criminal cases, reasoning that giving the government private access to the ear of the court is not only "a gross breach of the appearance of justice," but also a "dangerous procedure." *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992) (citation omitted); *see also United States v. Earley*, 746 F.2d 412, 416 (8th Cir. 1984) (suggesting that ex parte communications should be strongly discouraged "[r]egardless of the propriety of the court's motives," because allowing ex parte approaches undermines confidence in the court's impartiality). Ex parte approaches "can only be justified and allowed by compelling state interests." *Minsky*, 963 F.2d at 874. Suffice it to say that the government bears the burden of demonstrating that the defendant was not prejudiced by an ex parte communication, and its burden is "a heavy one." *Id.* (citation omitted).

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In response to Carmichael's argument, the government first asserts that this court lacks jurisdiction to consider Carmichael's Sixth Amendment claim because he did not raise it in the district court. This assertion is incorrect and, as the government properly acknowledged in its post-hearing notice of supplemental authority, has been squarely rejected by this court. *See United States v. Hayes*, 218 F.3d 615, 619-20 (6th Cir. 2000) (explaining that although the courts of appeals ordinarily do not entertain arguments that were not advanced in the district court, the rule is one of prudence rather than one of jurisdiction).

On the other hand, the government is correct in pointing out the unfairness of allowing Carmichael to raise for the first time on appeal conduct that he acquiesced in below. *See United States v. Torres*, 199 F.3d 1324 (2d Cir. 1999) (unpublished table decision) (finding that the defendant had waived his right to be present at a sidebar when his attorney failed to contemporaneously object). Such acquiescence lulled the district court into believing that Carmichael had no objection to the government's unusual request. To now allow the ex parte communications to be objected to after-the-fact is a form of "sandbagging" that we will not permit in the absence of proof that the content of what was in fact communicated adversely affected Carmichael's substantial rights. *See United States v. Throckmorton*, 87 F.3d 1069 (9th Cir. 1996), where the district court was found to have erred in its ex parte communication with the jury, but the error did not require reversal because the defendant's "substantial rights" were not affected. *Id.* at 1073. The Ninth Circuit noted that the district court judge "disclosed in open court and on the record that he had communicated ex parte with the jury.

If counsel had been concerned about this they could have voiced their concern to the district court and an appropriate record could have been made." *Id.*

The contents of the colloquy between the district court and the government have now been made available to both Carmichael's appellate counsel and to this court. We find nothing in the content of what was actually communicated that adversely affected Carmichael's substantial rights, and therefore conclude that he has waived his right to raise this issue on appeal. This brings us back full circle to the rule of *Hernandez*, by which we are bound. We therefore find no merit in Carmichael's arguments relating to the failure of the district court to review the transcripts of Adams's wiretapped telephone conversations.

The dissent claims that we have distorted Sixth Circuit precedent in an effort to circumvent the teachings of *United States v. Minsky*, 963 F.2d 870 (6th Cir. 1992). Dis. Op. at 22-23. *Minsky*, however, does not flatly ban ex parte communications. The *Minsky* court noted that, if the government is able to meet its heavy burden of proving a lack of prejudice to the defendant, "there are circumstances where an ex parte communication might be 'overlooked.' " 963 F.2d at 874. Such is the case here. The government in *Minsky* was unable to articulate any justification for denying defense counsel the opportunity to participate in the conference, and the information discussed in the ex parte communication was found to constitute a *Brady* violation. *Id.* at 874-75. Here, in contrast, the government provided a reasonable justification for its request, defense counsel did not object, and we find nothing in the ex parte communications that adversely affected Carmichael's substantial rights.

The dissent also asserts that a "thorough reading of the record demonstrates an objection by Defendant." Dis. Op. at 24. A thorough reading of the record, however, establishes just the opposite. While counsel for both the government and the defense were at the bench, the government attorney asked to discuss the matter privately with the judge. In response, Carmichael's lawyer replied, "Well, Judge, that's your call." Then when the judge stated that he would see what the prosecution was referring to, defense counsel answered, "Yes, sir." If ever there appears to be a case of acquiescence, this is it. Defense counsel only objected to the district court's acceptance of the government's ex parte representations *after the fact*, not to the ex parte discussion itself that was done under defense counsel's very nose without objection.

The dissent further argues that Carmichael's substantial rights were adversely affected "because the government made misstatements during the *ex parte* communication that, if corrected, would have prompted the district court to review the documents *in camera*." Dis. Op. at 27. Aside from the speculative nature of such a conclusion, there is no basis to believe that the documents in fact would have been of any value to Carmichael in impeaching Adams's testimony. The government affirmatively represented to the contrary, and the district court was within its rights to accept the government's representation. *See Hernandez*, 31 F.3d at 360-61.

Finally, we cannot help but note the strident tone adopted by the dissent, asserting the majority's "total disregard for the meaning of the Sixth Amendment," Dis. Op. at 21, our

purported "desecrat[ion]" of the oath "to serve as protectors of the United States Constitution," Dis. Op. at 29, and the dissent's unwillingness to "be a party to this miscarriage of justice." Dis. Op. at 21. We find such rhetoric to shed more heat than light on the issue before us, and we respectfully suggest that none of these accusations is justified. In the end, the only thing "desecrated" by such language is collegiality.

C. Sufficiency of the evidence

In order to convict Carmichael of violating the Hobbs Act, the government had to prove that Carmichael wrongfully obtained or attempted to obtain property from Adams, and that he did so either under "color of official right," or "by wrongful use of actual or threatened force, violence, or fear." *See* 18 U.S.C. § 1951(b)(2). Carmichael argues that the government failed to prove either of these elements beyond a reasonable doubt. In reviewing challenges regarding the sufficiency of the evidence presented to the jury, we are limited to ascertaining whether, viewing the evidence in the light most favorable to the government, *see United States v. Talley*, 164 F.3d 989, 996 (6th Cir.), *cert. denied*, 526 U.S. 1137 (1999), "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

Carmichael argues that there was insufficient evidence for a jury to conclude that he attempted to obtain property from Adams under color of official right because there is no evidence that Carmichael ever explicitly told Adams words to the effect that "if you do not give me money, I will see to

it that you are prosecuted." The short answer is that under the Hobbs Act, "[t]he official and the payor need not state the quid pro quo in express terms . . . . [O]therwise the law's effect could be frustrated by knowing winks and nods." *See Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring). A jury could reasonably have found that the "understanding" Carmichael had with Adams was that Adams would make substantial cash payments to Carmichael in exchange for Carmichael continuing to let Adams conduct his illegal gambling operations without the risk of being prosecuted by Carmichael.

Carmichael also asserts that "none of the [police] officers involved testified that the Defendant prohibited, discouraged, or otherwise stalked [sic] any attempt by any agency to pursue criminal charges against Adams for his illegal gambling or anything else." From there, Carmichael reasons that "[c]learly, if there had been a deal of any kind, the involved officers would have noted such deals in their investigative reports." This argument is meritless for several reasons. Without being exhaustive, one of those reasons is that Carmichael, and not any of the police officers, was the public official who would ultimately have been responsible for prosecuting (or not prosecuting) Adams. Another reason is that under the Hobbs Act, a public official who has demanded funds in exchange for official action or inaction need not make good on his end of the quid pro quo in order for his demand to be considered extortion. *See Evans v. United States*, 504 U.S. 255, 268 (1992) ("[T]he offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the quid pro quo is not an element of the offense.").

Carmichael also points out that "[t]he taped conversations are devoid of references by the Defendant to his elected position, his law enforcement status, his power to prosecute, or any other authority." He appears to be suggesting that in order for a public official to extort money from someone under color of official right, the official must explicitly remind the victim that he is a public official, and that he has the power to make bad things happen to the victim if he does not accede to the official's explicit or implicit demand for payment. Carmichael cites no authority to support such an argument, and we reject it. In any event, there can be no question in the case before us that Adams was well aware of Carmichael's position and his power to prosecute Adams. Indeed, this was the very reason that Adams had his attorney contact Carmichael shortly after Adams was charged with a new offense in late 1997.

Carmichael also asserts that there was no evidence that Carmichael attempted to obtain property from Adams by "wrongful use of actual or threatened force, violence, or fear." The jury, however, could reasonably have found that the intended implication of Carmichael's request for a very large cash contribution was that if Adams did not pay, Carmichael would cause Adams to be arrested and prosecuted, or would assist federal authorities in prosecuting Adams. We therefore conclude that the government produced sufficient evidence for a rational jury to convict Carmichael of violating the Hobbs Act.

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D. Challenge to the exclusion of a defense witness

Carmichael proffered the testimony of David Guffy, the detective assigned to Carmichael's office. If called to the stand, Carmichael argues, Det. Guffy would have testified that Carmichael had said that he was trying to set Adams up for making illegal campaign contributions. Because Carmichael allegedly told this to Det. Guffy before Carmichael had any reason to know that law enforcement officials were investigating him, Carmichael claims that Det. Guffy's testimony would have made the jury more apt to believe Carmichael's explanation that his apparent extortion of Adams was in reality an attempt to conduct a legitimate covert investigation of Adams. The district court, following a colloquy with counsel about Det. Guffy's proposed testimony, concluded that it would be inadmissible hearsay. Because of this ruling, Carmichael did not call Det. Guffy to testify.

We agree with the district court that Det. Guffy's testimony would have been hearsay. *See* Fed. R. Evid. 801(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Carmichael, in fact, concedes that Det. Guffy's testimony was intended to show not just that Carmichael *told* Det. Guffy that he was investigating Adams, but "that [Carmichael actually] was conducting his own investigation of Adams."

Had Carmichael taken the stand, Det. Guffy's testimony might have been admissible as a statement consistent with Carmichael's testimony and offered to rebut a charge that

Carmichael had only recently fabricated the idea that he was investigating Adams. *See* Fed. R. Evid. 801(d)(1) (providing that a witness's statement that is "consistent with the declarant's testimony and . . . offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive" is not hearsay if the declarant testifies and is subject to cross-examination regarding the statement). But Carmichael did not testify, and a major reason for the prohibition on hearsay evidence is precisely to prevent litigants from introducing second-hand statements about what they were thinking or doing without subjecting themselves to cross-examination. *See, e.g.*, *Anderson v. United States*, 417 U.S. 211, 220 (1974) ("The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence."); *Cannady v. United States*, 351 F.2d 796, 798 (D.C. Cir. 1965) ("The purpose of the hearsay rule is to prohibit the use of . . unsworn, uncross-examined testimony as substantive evidence in a case.").

Whether Det. Guffy's testimony might also have been admissible, as Carmichael now argues, under the exception to the hearsay rule that permits the admission of statements regarding a declarant's "then existing state of mind [or] emotion," Fed. R. Evid. 803(3), would appear to be a reasonably close question. Admissibility under Rule 803(3) does not depend on whether Carmichael was available as a witness. *See* Fed. R. Evid. 803. The argument that Det. Guffy's testimony was admissible under Rule 803(3), however, was not advanced in the district court. *See Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445,

1461 (6th Cir. 1988) (" 'It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.' ") (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)).

In any event, even if Carmichael had raised this argument in the district court, we have doubts whether Det. Guffy's testimony would have been admissible under Rule 803(3). *See United States v. LeMaster*, 54 F.3d 1224, 1231 (6th Cir. 1995) (observing that in order for a statement to be admissible under Rule 803(3), "the declarant must not have had an opportunity to reflect and possibly fabricate or misrepresent his thoughts"). It is not beyond the realm of possibility that Carmichael intended to extort money from Adams, but had misrepresented his thoughts to Det. Guffy in an attempt to hedge his bet in the event that something might go wrong later, even if Carmichael did not know at the time that he was the target of an investigation.

The applicable standard of review regarding rulings on hearsay evidence appears to be somewhat unsettled within the circuit. *Compare Stalbosky v. Belew*, 205 F.3d 890, 894 (6th Cir. 2000) (observing that this court has traditionally reviewed de novo district court conclusions about whether proffered evidence is hearsay) *with Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 716-17 (6th Cir. 1999) (concluding that the Supreme Court's decision in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), silently overruled this court's "heretofore well-settled precedent that hearsay evidentiary rulings are reviewed de novo" and requires abuse-of-discretion review). We conclude, however, that the district court's ruling on this issue should not be disturbed under either standard.

Appendix A

E. Jury instructions

Carmichael argues that the district court's instructions to the jury were faulty in two respects. First, he asserts that the district court's instructions regarding specific intent were defective. Second, he contends that the district court, after directing a judgment of acquittal on Count I of the indictment, failed to appropriately instruct the jury not to consider evidence that related to the dismissed count during its deliberations on Count II.

Carmichael's argument regarding the lack of a specific-intent instruction appears to be based on *United States v. Collins*, 78 F.3d 1021, 1033 n.9 (6th Cir. 1996), which he cites for the proposition that the district court was required to instruct the jury that, in order to convict Carmichael, it had to conclude that he intended to violate the law. In *Collins*, which was a Hobbs Act case, this court observed in a footnote that the jury had received "the standard instruction" on specific intent, i.e., that "the government must prove beyond a reasonable doubt that the defendant knowingly did an act which the law forbids or knowingly failed to do an act which the law requires, purposely intending to violate the law." *Id.*

The *Collins* court did *not* hold that this instruction was required. In fact, a number of other courts have concluded in Hobbs Act cases that it is not. *See, e.g.*, *United States v. Arena*, 918 F. Supp. 561, 569 (N.D.N.Y. 1996) (concluding that a conviction for Hobbs Act extortion does not require a finding of specific intent); *United States v. Furey*, 491 F. Supp. 1048, 1058-59 (E.D. Pa.) (concluding that because words such as "knowingly" or "willfully" are conspicuously

absent from the Hobbs Act, the ordinary criminal law rule that "ignorance of the law is no excuse" applies), *aff'd*, 636 F.2d 1211 (3d Cir. 1980); *see also Evans v. United States*, 504 U.S. 255, 268 (1992) ("We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."). To the extent that Carmichael is arguing that the district court was required to instruct the jury that, in order to convict Carmichael, it had to conclude that Carmichael intended to violate the Hobbs Act, we reject the argument as unsupported by the law.

Carmichael also argues that the district court erred by only requiring that the jury find that Carmichael's behavior made Adams fearful, and not that Carmichael intended his behavior to inspire this fear. This argument is not supported by the record. The district court instructed the jury that "it is enough if the public official knew that the person giving him the thing of value had the expectation that the public official would extend some benefit or refrain from some harmful action in return for the thing of value." We find the instruction to be a correct statement of what Carmichael must have known in order to be guilty of extortion under the Hobbs Act.

In addition, Carmichael asserts that the district court's instruction to the jury regarding the dismissed count of the indictment was defective. The district court instructed the jury that Carmichael was "only on trial for the particular crime charged in the indictment," and that the jury's job was "limited to deciding whether the government has proved the

crime charged." In addition, the district court gave the instruction that "for reasons that you should not consider [or] speculate about, Count One of the indictment is no longer for your consideration." Carmichael requested that the district court also instruct the jury that the dismissed count of the indictment "involved the testimony regarding the Christmas decorations," and that the jury "should not speculate regarding the evidence pertaining to Count One." The district court rejected both requests. There was no attempt by counsel to explain what, in his opinion, was wrong with the court's proposed instruction, and there was no further objection by counsel.

Carmichael has not identified any discernible error in the district court's instructions. *See* Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection."); *Pena v. Leombruni*, 200 F.3d 1031, 1035 (7th Cir. 1999) (discussing analogous Civil Rule 51) ("An objection to instructions is forfeited by a failure to state distinctly . . . the grounds of the objection. It is not enough to propose a correct instruction.") (brackets, internal quotation marks, and citation omitted), *cert. denied*, 120 S. Ct. 2207 (2000).

In the present case, the indictment contained only two counts, and there is no question that the jury already knew which count pertained to which conduct. Regarding the proposed additional instruction that the jury not speculate about "the evidence pertaining to Count One," we find it

difficult to understand how Carmichael's proposal would have clarified what he claims was an unclear instruction. We therefore conclude that Carmichael has failed to preserve his objections to the jury instructions, and we find no plain error of the type that would authorize us to overturn the district court's ruling in the absence of a proper objection. *See United States v. Olano*, 507 U.S. 725 (1993) (explaining the proper function of the "plain error" rule under the Federal Rules of Criminal Procedure).

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** Carmichael's conviction.

Appendix A

DISSENT

DAMON J. KEITH, Circuit Judge, dissenting. The majority opinion is a distressing and total disregard for the meaning of the Sixth Amendment to the United States Constitution and the law of this Circuit. The right to effective assistance of counsel, as assured by the Constitution, "requires that a defendant be represented at every critical stage of his trial." *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992) (citing *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984)). This constitutional guarantee stands as a near absolute prohibition to *ex parte* conferences between the government and the district court. In keeping with this fundamental guarantee, I must express my deep disappointment and outrage with the majority's decision. Condoning *ex parte* discussions between the trial court and government cannot be tolerated, and I will not be a party to this miscarriage of justice. Accordingly, I respectfully dissent.

"The value of a judicial proceeding is substantially diluted where the process is *ex parte*, because the court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). This statement, articulated by the Supreme Court in 1968, is no less true today. Indeed, this Court adopted the Supreme Court's very words in espousing our distaste for *ex parte* proceedings. *See Minsky*, 963 F.2d at 874 (citing *Carroll*, 393 U.S. at 183).

Appendix A

In *United States v. Minsky*, this Court heard Gerald L. Minsky's ("Minsky") appeal from his convictions of mail and wire fraud and conspiracy to kill a horse for the insurance proceeds. 963 F.2d at 871. After two government witnesses testified against Minsky, Minsky requested, pursuant to the Jencks Act, 18 U.S.C. § 3500, that the prosecution produce prior statements made by the witnesses. *See id.* at 872. Specifically, Minsky requested Federal Bureau of Investigation forms containing the witnesses' statements, but the prosecution objected. *See id.* In resolving the situation, the district court held an *in camera* review of the forms, followed by a private conversation with the prosecution. *See id.* On appeal, Minsky challenged his conviction, arguing that the *ex parte* conference perverted his trial. *See id.* at 871.

Ultimately, Judge Timbers, speaking on behalf of this Court, held that the district court's *ex parte* conference with the prosecution was indeed grounds for reversal. *See id.* at 873-74. The Court did not soft-pedal the issue. Instead, it railed against the exclusion of a criminal defendant from proceedings crucial to his trial. The Court resolutely declared that "[t]he constitution requires that a defendant be represented at every critical stage of his trial." *Id.* at 874. The Court continued, "not only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure." *Id.* (quoting *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969)).

Indeed, it is a dangerous procedure. *Ex parte* conferences tear at the very heart of a defendant's fair trial and severely undermine confidence in our judicial process. As such, this

Court only allows for *ex parte* conferences under the narrowest of circumstances. In *Minsky*, this Court noted that "[*e*]*x parte* proceedings 'can only be justified and allowed by compelling state interests.' " *Id.* at 874 (quoting *In re Taylor*, 567 F.2d 1183, 1188 (2d Cir. 1977)). The Court stated that "[a]lthough there are circumstances where an *ex parte* communication might be 'overlooked,' 'the burden of proving lack of prejudice is on the [government], and it is a heavy one.' " *Id.* (quoting *Haller*, 409 F.2d at 860). To my bewilderment, the majority distorts Sixth Circuit precedent in an effort to circumvent the teachings of Minsky.[1] I strongly object.

Initially, the majority correctly demonstrates this Court's strong preference to discourage *ex parte* conferences. The majority acknowledges that, "in all but the most exceptional circumstances, *ex parte* communications with the court are an extraordinarily bad idea." Furthermore, the majority notes that this Court has held that *ex parte* communications are "a gross breach of the appearance of justice." Finally, the majority recognizes that "the government's burden of demonstrating that the defendant was not prejudiced by an

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1. The majority mischaracterizes and dilutes the requirements of *Minsky*, concluding that the government need only "articulate" a "reasonable justification" for the *ex parte* conference. The majority manufactures its own "reasonable justification" standard, and substitutes this standard for the "compelling state interest" standard imposed by *Minsky*. These standards are legally distinct. The majority's invented standard improperly lowers the government's "heavy" burden to demonstrate a compelling state interest. Moreover, this standard is wholly unsupported by the law of this Circuit. I respectfully reject the majority's proposed standard.

ex parte communication is 'a heavy one.' " After articulating this Court's profound distaste for *ex parte* communications and acknowledging the Court's jurisdiction to consider Carmichael's Sixth Amendment claim, the majority then engages in cursory analysis before summarily rejecting Carmichael's claims.

The proper analysis begins with a fair determination of whether a defendant objected to the *ex parte* communication. When a defendant objects contemporaneously to the *ex parte* communication, our analysis proceeds directly to a determination of whether the government has demonstrated a compelling state interest and lack of prejudice to the defendant. *See Minsky*, 963 F.2d at 874. After a careful review of the record, I find that Carmichael sufficiently preserved this issue for review by this Court.

During a discussion in open court regarding Carmichael's request for disclosure of *Jencks* and *Brady* material, the district court judge instructed both defense counsel and the government to approach the bench. The government then stated to the district judge that this discussion should be conducted "without them," i.e., without defense counsel. In response to defense counsel's suggestion that the trial court was the appropriate authority to determine the propriety of these discussions, the district court permitted the *ex parte* conference. After private discussions that constitute eight pages of transcripted record, the district court announced its satisfaction with the representations made by the government. In objecting to the district court's acceptance of the government's *ex parte* representations, defense counsel was assured by the district court that his concerns were "sufficient" for the record.

Despite defense counsel's clear dissatisfaction with the actions of the government and the district court, the majority concludes that "Carmichael's attorney did not object." Accordingly, the majority analyzes Carmichael's claim pursuant to Federal Rule of Criminal Procedure 52(b). However, a thorough reading of the record demonstrates an objection by Defendant rendering this analysis unnecessary. While maintaining that this analysis is unnecessary, I find Carmichael's claim meets the heightened scrutiny required by Rule 52(b).

Where a defendant fails to object during a federal criminal prosecution, Rule 52(b) vests appellate courts with the discretion to review these claims for plain error. The majority correctly states that this Court can hear Carmichael's claim regardless of whether it was raised in the district court. In *United States v. Thomas*, 11 F.3d 620, 629-30 (6th Cir. 1993), this Court outlined the requirements for appellate review for plain error. While "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court," Fed. R. Crim. Pro. 52(b), "[t]he Court of Appeals' power under Rule 52(b) is limited in three significant respects." *Id.*

"The first limitation is that the error in question must have occurred in the district court proceedings." *Id.* at 629; *accord*, *Olano*, 507 U.S. 725, 732 (1993). In *Thomas*, this Court held "that a deviation from a legal rule constitutes an error within the meaning of Rule 52(b) so long as the rule has not been waived by the defendant." 11 F.3d at 629. The Court noted "that the mere failure of a defendant to make a timely assertion of a right does not constitute a waiver, but

rather, constitutes a forfeiture and that in those circumstances an error under Rule 52(b) is not extinguished." *Id.* Here, the *ex parte* communications were a deviation from a well-established legal rule which Carmichael did not waive. Therefore, Defendant has satisfied the first requirement.

"The second limitation on appellate authority under Rule 52(b) is that the error be 'plain.' " *Id.* at 630 (quoting *Olano*, 507 U.S. at 734). Because *ex parte* conferences are generally disallowed under the law of this Circuit, *see Minsky*, 963 F.2d at 874, the error is "plain."

"The third limitation on appellate authority under Rule 52(b) 'is that the plain error affect[s] substantial rights.' " *Thomas*, 11 F.3d at 630 (quoting *Olano*, 507 U.S. at 734). Generally, "the phrase 'affect substantial rights' means 'prejudicial' in the sense that the asserted error 'must have affected the outcome of the district court proceedings.' " *United States v. Hayes*, 218 F.3d 615, 622 (6th Cir. 2000) (quoting *Olano*, 507 U.S. at 734). However, the Supreme Court noted, and this Circuit recognized, that "[t]here may be a special category of forfeited errors that can be corrected regardless of their affect on the outcome" and "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735; *see also Hayes*, 218 F.3d at 622. The Supreme Court listed as examples of these types of errors instances where "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . ." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). By allowing *ex parte* conferences before and during trial, the district court demonstrated a willingness to share intimate discourse with

the government while excluding Defendant. Once an affinity between the district court and the government has been established, the district court's ability to serve as a neutral arbiter is suspect. This affinity perverts the adversarial process and creates an intolerable air of partiality. The Supreme Court found that a trial conducted before "a judge who [i]s not impartial" to be a "structural defect affecting the framework within which the trial proceeds." *Id.* at 309-10. In light of the foregoing, the majority's conclusion that the *ex parte* communications did not affect Carmichael's substantial rights offends traditional notions of fairness and opens the door for prosecutorial abuse.

Having concluded that Carmichael's claim is a "[p]lain error[ ] . . . affecting [his] substantial rights," Fed. R. Crim. Pro. 52(b), the analysis turns on whether this Court should exercise its discretion to correct the error. The Supreme Court has stated that "[t]he court of appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Olano*, (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). In this matter, no genuine dispute exists as to whether the *ex parte* conference below compromised "the fairness, integrity, and public reputation of judicial proceedings." *Id.* Therefore, this Court has the authority, and indeed the duty, to review his claim.

Having found that Defendant objected to the *ex parte* proceeding, and also having found that the claim deserves correction under a "plain error" analysis, the sole question is whether the government has met its burden under *Minsky*. 963 F.2d at 874. Under *Minsky*, "[*e*]*x parte* proceedings 'can

only be justified and allowed by compelling state interests.' " *Id.* Moreover, this Court can only "overlook" an *ex parte* communication if it is not prejudicial to the defendant. *Id.*

I conclude that the government has failed to present a compelling state interest to justify the *ex parte* communications. Although the government undoubtedly has a strong interest in protecting the details of its on-going drug investigation, this interest could have been protected through less intrusive measures. In fact, as noted by the majority, a simple representation by the government in open court that the material Defendant sought did not contain *Brady* material would have satisfied both *Minsky* and *Hernandez*, 31 F.3d 354, 361 (6th Cir. 1994). Oddly, while *Hernandez* allows the district court to rely on statements by prosecutors concerning the absence of *Brady* material in its possession, the government opted to engage in unnecessary and protracted *ex parte* discussions with the district court. The government, having elected to make representations beyond those deemed sufficient by *Hernandez*, was required to make its representations in open court. The government fails to state a sufficiently compelling reason for excluding Defendant from these discussions. Moreover, any state interest in *ex parte* discussions between the government and the trial court is outweighed by the resulting prejudice to Carmichael.

As stated previously, "the burden of proving lack of prejudice is on the [government], and it is a heavy one." *Minsky*, 963 F.2d at 874 (quoting *Haller*, 409 F.2d at 860). Carmichael argues that the conference was prejudicial and adversely affected his substantial rights because the

government made misstatements during the *ex parte* communication that, if corrected, would have prompted the district court to review the documents *in camera*. Putting the veracity of Carmichael's assertions aside,[2] the failure of the district court to afford defense counsel an opportunity to hear and respond to the government's representations denied Defendant his right to effective assistance of counsel.[3] Allowing the government unfettered access to the court's ear undermines the adversarial process and taints the appearance of judicial impartiality. The district court's ruling on the *Brady* material "may well have been due not only to the fact that the prosecutor got in his pitch first, but, even more insidiously, to the very relationship, innocent as it may have been thought to be, that permitted such disclosures."

---

2. The majority asserts that "the dissent . . . argues that Carmichael's substantial rights were adversely affected 'because the government made misstatements during the *ex parte* communication that, if corrected, would have prompted the district court to review the documents *in camera*.' " This assertion is a distortion of the truth.

3. The majority opinion concludes that there is "no basis to believe that the document in fact would have been of any value to Carmichael." In reaching this conclusion, the majority relies on the government's assertion that the documents were not of any value to Carmichael. However, Carmichael has presented evidence that the prosecutor made misleading statements to the trial court, undoubtedly to avoid an *in camera* review and potential relinquishment of the documents in its possession to Carmichael. The prosecutor's misstatements to the district court constitute "an indication of misconduct," thus eliminating the presumption of truth bestowed on the government by *Hernandez*, 31 F.3d at 361. Accordingly, the majority's reliance on the government's assurances is misplaced.

Haller, 409 F.2d at 859-60. Since the government has not met its substantial burden of proving lack of prejudice to Carmichael, and has failed to demonstrate a compelling state interest, this *ex parte* communication does not fall within the narrow exceptions outlined in *Minsky*.

An *ex parte* communication between the government's counsel and the trial court denies the defendant his right to due process and effective representation. Further, this Court considers an *ex parte* conference a "gross breach of the appearance of justice" that deprives a defendant of his right to an impartial jurist and perverts the adversarial process. *Minsky*, 963 F.2d at 874 (quoting *Haller*, 409 F.2d at 859). Recognizing the import of this issue, other circuits have emphasized the dangers of allowing *ex parte* proceedings in criminal cases.

> *Ex parte* communications between the government and the court deprive the defendant of notice of the precise content of the communications and an opportunity to respond. These communications thereby can create both the appearance of impropriety and the possibility of actual misconduct. Even where the government acts in good faith and diligently attempts to present information fairly during an *ex parte* proceeding, the government's information is likely to be less reliable and the court's ultimate findings less accurate than if the defendant had been permitted to participate. However impartial a prosecutor may mean to be, he is an advocate, accustomed to stating only one side of the case. An *ex parte*

> proceeding places a substantial burden upon a trial judge to perform what is naturally and properly a function of an advocate.

United States v. Napue, 834 F.2d 1311, 1318-19 (7th Cir. 1987) (citations omitted); *accord*, *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977); *Haller*, 409 F.2d at 859-60. Moreover, *ex parte* communications, such as that below, violate ethical guidelines. Canon 3(A)(4) of the American Bar Association Code of Judicial Conduct states that "[a] judge should . . . neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceedings." Further, Canon 2(A) provides that "[a] judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The protection afforded criminal defendants from *ex parte* communications between the district court and the prosecutor is "not merely a matter of ethics; it is part of a defendant's right to due process and effective representation." *Haller*, 409 F.2d at 861.

Our criminal judicial system is premised upon certain fundamental rights — the right to effective assistance of counsel, the right to an impartial judge and jury, the right to the presumption of innocence, the right to due process. The majority opinion vitiates each of these basic guarantees. As judges of this Court we have sworn to serve as protectors of the United States Constitution. The majority desecrates that sacred oath. Consistent with the reasons stated above, I vehemently dissent.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5179

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

LAWRENCE RAY CARMICHAEL,

Defendant – Appellant.

Before: KEITH, DAUGHTREY, and GILMAN,
Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Kentucky at London.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the conviction of defendant Lawrence Ray Carmichael is AFFIRMED.

Appendix A

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY DATED AND FILED JANUARY 22, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

CASE NUMBER: LONDON CRIMINAL 98-76

UNITED STATES OF AMERICA

V.

LAWRENCE RAY CARMICHAEL

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Stephen Pence & David Tapp
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) 2 after a plea of not guilty.

Appendix B

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1951	Attempting to affect interstate commerce and movement of articles and commodities in interstate commerce by extortion, that is, attempting to obtain property of another under color of official right and induced by wrongful use and threat of use of fear	3/26/98	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.: 401-88-8069	January 22, 1999 Date of Imposition of Judgment
Defendant's Date of Birth: 10/22/58	
Defendant's USM No.: 06664-032	s/ Karl S. Forester Signature of Judicial Officer
Defendant's Residence Address: 126 Glendale Somerset, KY 42502	KARL S. FORESTER U. S. DISTRICT JUDGE Name & Title of Judicial Officer
Defendant's Mailing Address: Same	January 22, 1999 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 27 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends incarceration at the camp facility at the Federal Correctional Institution at Manchester, Kentucky.

* * *

Appendix B

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on March 1, 1999.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of two (2) years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

Appendix B

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

Appendix B

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment
Totals:	$ 100.00

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Criminal monetary penalties are payable to:

Clerk, U. S. District Court
Eastern District of Kentucky
Post Office Box 5121
London, KY 40745-5121

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

* * *

Appendix B

Guideline Range Determined by the Court:

Total Offense Level: 18

Criminal History Category: I

Imprisonment Range: 27 to 33 months.

Supervised Release Range: 2 to 3 years.

Fine Range: $ 6,000.00 to $ 60,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

* * * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITIONS FOR REHEARING DATED AND FILED DECEMBER 12, 2000

99-5179

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAWRENCE RAY CARMICHAEL,

Defendant-Appellant.

ORDER

BEFORE: KEITH, DAUGHTREY, and GILMAN, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

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* Judge Siler recused himself from participation in this ruling.

Appendix C

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied. Judge Keith would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk